

**FINDINGS AND RECOMMENDATIONS REGARDING ISSUANCE
OF A SAFE HARBOR SECTION 10 ENHANCEMENT OF SURVIVAL PERMIT FOR
RAZORBACK SUCKER AND BONYTAIL CHUB TO THE NEVADA DEPARTMENT
OF WILDLIFE (TE-126085-0)**

I. DESCRIPTION OF PROPOSAL

Nevada Department of Wildlife (NDOW) has applied to the Fish and Wildlife Service (Service) for an enhancement of survival permit pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act). The permit application includes a proposed Programmatic Safe Harbor Agreement (Agreement) between NDOW and the Service. NDOW will hold the enhancement of survival permit, and enroll landowners (Cooperators) through Cooperative Agreements and by issuing Certificates of Inclusion. The Agreement will authorize Cooperators to take razorback sucker (*Xyrauchen texanus*) and bonytail chub (*Gila elegans*) in accordance with activities stipulated in the proposed Agreement and Cooperative Agreement. The Agreement may include any and all private lands within Clark County, Nevada which includes private and local-government sites containing landscape and irrigation ponds which have been identified as potentially suitable for grow-out or refugia facilities for razorback sucker and bonytail chub (Attachment 1).

The purpose of this Agreement is to promote the conservation, enhancement of survival and recovery of the endangered razorback sucker and bonytail chub through the development of facilities for the rearing of juvenile fishes on private and non-Federal lands for use in augmentation of extant wild populations, and for the development and maintenance of facilities suitable to provide refuge habitats for the long-term maintenance of adult individuals of those species. Under this programmatic Agreement, Cooperators will make habitat available to razorback sucker and bonytail chub and will assist with maintenance and management of those species and their habitats on enrolled properties over a period of 50 years.

This Agreement will serve as the basis for the Service and the Department to issue permits under ESA section 10(a)(1)(A), NRS '503.181 and 503.585, and NAC '503.093 that allow the incidental take of razorback sucker and bonytail chub. This Agreement will authorize the Department to enroll landowners (Cooperators) with Certificates of Inclusion under the Federal permit and State permit when Cooperators sign individual Cooperative Agreements that describe actions that will be taken to benefit razorback sucker and bonytail chub. Thus, the Cooperators will be authorized to take razorback sucker and bonytail chub that have increased above the baseline established in this Agreement and Cooperative Agreements as a result of the Cooperators' voluntary conservation activities. Although the Agreement and permit will authorize incidental take of razorback sucker and bonytail chub associated with returning the enrolled property to its agreed-upon baseline condition, which would typically be zero individuals, the Parties anticipate that this level of take is unlikely to be realized except under unforeseen circumstances out of the reasonable control of the Department, Service or individual Cooperators.

Given the probable time required to enroll individual Cooperators, develop or enhance aquatic rearing habitats, and provide included habitats with sub-adult fish for rearing, the Parties

estimate it may take two [2] years of implementing the Agreement to fully reach a net conservation benefit for the species, although some level of benefits will likely occur within a shorter time period. Based on previous experience in the use of grow-out facilities for razorback sucker (NDOW 2001), the 50-year duration of this Agreement is considered sufficient to establish, use and maintain grow-out ponds for razorback sucker and bonytail chub on properties enrolled through Cooperative Agreements at a level that will substantially augment and assist recovery efforts for those species. The 50-year permit term will be advantageous to the Parties because of the potential that additional properties with facilities suitable for use as grow-out ponds could be developed over the term of the permit and enrolled for conservation purposes under Cooperative Agreements and Certificates of Inclusion.

The Department may enroll Cooperators under Cooperative Agreements at any time from the date this Agreement is signed until 10 years before it terminates. Obligations under Cooperative Agreements will be in effect for variable lengths of time depending on the property covered and the desire of the Cooperator and the Department, but the minimum duration of obligations will be for five (5) years from the date each Cooperative Agreement is signed. Upon signing of a Cooperative Agreement, the Department will issue a Certificate of Inclusion to a Cooperator authorizing the incidental take of razorback sucker and bonytail chub on the Cooperator's lands.

The findings are based upon the following documents incorporated by reference: 1) programmatic Safe Harbor Agreement for Voluntary Enhancement/Restoration Activities Benefiting razorback sucker and bonytail chub) Biological Opinion on the Effects of the Issuance of an Enhancement of Survival Permit Under Section 10(a)(1)(A) of the Endangered Species Act of 1973, as Amended, to the Nevada Department of Wildlife (File Number 1-5-06-F-125); and 3) Environmental Action Statement Screening Form for the Programmatic Safe Harbor Agreement.

Analysis of Effects

The primary objective of this proposed Agreement is to encourage voluntary habitat restoration, maintenance, or enhancement activities to benefit razorback suckers and bonytail chub by relieving a landowner, who enters into and implements, the provisions of a Cooperative Agreement and Certificate of Inclusion with NDOW, from any additional section 9 liability under the Act beyond that which exists at the time the Cooperative Agreement is signed (baseline responsibilities). As long as landowners carry out agreed-upon conservation measures on their property and maintain their baselines, they may continue or undertake future covered management activities. The overall goal is to produce conservation measures that are mutually beneficial to the Cooperator and the long-term existence of razorback suckers and bonytail chub.

The primary objective of this Agreement is to aid in the recovery of razorback sucker and bonytail chub and to assist in the re-establishment of wild populations of those species that in some situations may become self-sustaining. In order to accomplish this, it is essential that private landowners, the Service, and the Department work together to provide good habitat and positive stewardship for sites to be used for adult refuges and for the rearing of sub-adult razorback sucker and bonytail chub prior to their release to the wild. Management activities that are undertaken through Cooperative Agreements will result in additional areas being available

for the rearing of razorback sucker and bonytail chub in protected habitats, which will provide additional razorback sucker and bonytail chub of a suitable size for release into the wild, and for the maintenance of adult refuge populations. Until such a time as razorback sucker and bonytail chub are placed on an included property for purposes of rearing and maintenance, the Cooperator will have no responsibilities under this Agreement except to implement those specific actions, including maintenance of habitat quantity and quality, agreed to in the Cooperative Agreement.

Primary recovery guidance for the razorback sucker and bonytail chub is provided by recovery plans developed respectively for each species (USFWS 1990, 1998), recently completed recovery goals which supplement the species recovery plans (USFWS 2002b, 2002c), an Upper Colorado River Basin Recovery Action Plan and a recovery implementation strategy plan for the Lower Colorado River Basin (USFWS 2005). Recovery direction and ongoing activities for razorback sucker and bonytail chub as they relate to the purpose of this Agreement and actions that will be conducted by the cooperators to the Programmatic Safe Harbor Agreement and holders of Certificates of Inclusion to this Agreement are detailed below by species.

II. PUBLIC COMMENT

The Service published a Notice of Availability of an Environmental Action Statement and receipt of an application for the issuance of an enhancement of survival permit for the programmatic Safe Harbor Agreement for Nevada Department of Wildlife in the *Federal Register* on September 29, 2006 (71 FR 57558). Publication initiated a 30-day public comment period that closed on October 30, 2006. Copies of the Environmental Action Statement and draft programmatic Safe Harbor Agreement were made available by request and on the Nevada Fish and Wildlife Office's website. No public comments were received.

III. ENHANCEMENT OF SURVIVAL PERMIT CRITERIA

The Service may issue an enhancement of survival permit for a Safe Harbor Agreement provided that the permit issuance criteria are met pursuant to 50 CFR 17.22(c)(2) and 17.32(c)(2). Below we address the issuance criteria with respect to the permit application from NDOW.

- 1. The taking of razorback suckers and bonytail chub will be incidental to an otherwise lawful activity and will be in accordance with the terms of the proposed Safe Harbor Agreement.**

Consistent with Safe Harbor Policy, the enhancement of survival permit, through Certificates of Inclusion to landowners, authorizes incidental take of razorback suckers or bonytail chub as a result of lawful activities within the enrolled lands. Such take of these species may result only unintentionally and must occur as incidental to otherwise lawful activities associated with customary management or conservation measures. Monitoring on at least a semi-annual basis will be used to evaluate species benefits through visits to occupied lands to ascertain species presence, aquatic habitat quality, and the efficacy of current management activities. Conservation measures that reduce impacts from the management activities and promote conservation and long-term persistence will be implemented.

The Permit/Certificate of Inclusion also allow(s) for the eventual return to landowner baseline conditions, the baseline for each landowner signing a Cooperative Agreement is the number of razorback sucker and bonytail chub, on the property and/or the amount of occupied, suitable habitat, except that for those enrolled properties which contain only pond facilities that will be managed as active rearing and grow-out facilities for razorback sucker and/or bonytail chub, the baseline for those species will be assumed to be zero. Each Cooperative Agreement will specify the baseline for the particular property covered under that Cooperative Agreement. The template for a Cooperative Agreement is included as Attachment 2.

Before returning to baseline conditions, a Cooperator must demonstrate that baseline conditions were maintained and that activities necessary to achieve a net conservation benefit were carried out for the duration of the Cooperative Agreement. Before the end of the Cooperative Agreement and Certificate of Inclusion, a Cooperator may reduce the covered species numbers or habitat to the established baseline to avoid accruing additional take under the Act. However, no species or habitat shall be impacted until the Cooperator has given NDOW, the Service, or their representatives, prior notice of at least 30 days so that individual suckers and chub can be relocated. Thus, even a return-to-baseline condition/worst case scenario, is not likely to jeopardize the continued existence of these species. Additionally, it is the opinion of the Service that the Agreement and any resultant take authorized by the Permit will not appreciably reduce the likelihood of survival and recovery in the wild of razorback suckers and bonytail chub and are expected to provide a net conservation benefit to each of these species.

2. **The implementation of the terms of the proposed Safe Harbor Agreement will provide a net conservation benefit to the affected listed species by contributing to the recovery of the listed species included in the Permit and the Safe Harbor Agreement otherwise complies with the Safe Harbor policy available from the Service.**

The Service and NDOW have developed an Agreement in accordance with the Final Safe Harbor Policy (64 FR 32717) that allows for the creation, enhancement, maintenance, and restoration of razorback sucker and bonytail chub habitat. The proposed Agreement is expected to provide a net conservation benefit for razorback suckers and bonytail chub by contributing to recovery as a result of:

Razorback sucker and bonytail chub require predation-free, stable pond environments for the rapid growth of juvenile fish to a size range suitable for release to unprotected habitats. Suitable pond environments on public lands in Clark County are limited primarily to managed, isolated backwaters along the shoreline of Lake Mohave which are subject to uncontrolled public access and variable environmental and water level conditions which cannot be fully manipulated to the benefit of the covered species. Ponds located on private lands which are maintained for landscape, recreation and irrigation purposes frequently have more controlled access and have a higher ability to control certain environmental variables including water level, contaminants, and

contamination with undesirable species which would limit productivity and the ability to provide suitably-sized individual covered species for augmenting wild populations. The total acreage of suitable grow-out ponds available on public lands is not adequate to meet production needs of covered species to address current and future recovery and population augmentation goals, and this acreage cannot be expanded on public lands without construction of new pond facilities or substantive renovation of existing backwaters and other habitats, which may be of detriment to other wildlife species dependent on wetland and backwater habitats. Similarly, isolated pond and backwater habitats suitable for long-term maintenance of adult razorback sucker and bonytail chub populations are very limited on public lands, and will not meet the identified need for environments to sustain replicate, persistent adult populations to maintain the security of genetic stocks independent of production requirements for fish to be released to the wild. Existing private pond facilities in Clark County can meet much of the existing needs for production and refuge habitats without the need to construct new facilities and without the loss of existing habitat values for resident wildlife.

Implementation of this SHA is expected to result in increased numbers of razorbacks and bonytails in the wild. If all the landowners return their property to baseline conditions after 50 years, which is not expected, populations will still exist within public lands that have become linked due to conservation activities, spawning habitat, and overwintering habitat.

3. The probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any listed species.

Issuance of this section 10(a)(1)(A) permit was reviewed by the Service under section 7 of the Act. The Act's legislative history establishes the intent of Congress that this issuance criteria be based on a "no jeopardy" finding pursuant to section 7(a)(2) of the Act and the implementing regulations pertaining thereto (50 CFR 402.02). In the biological opinion, incorporated herein by reference, the Service concluded that the direct and indirect effects of any authorized take are not likely to jeopardize the continued existence of the razorback sucker or bonytail chub.

The potential effects of implementing this SHA on other listed and candidate species that could be affected within the project area are expected to be less than significant on the range-wide population of yellow-billed cuckoo, bald eagle, southwestern willow flycatcher, and Yuma clapper rail, which are rare in the area and are terrestrial species. Although relict leopard frogs inhabit aquatic systems, the effects of the SHA on the range-wide population are expected to be nominal because there is little distributional overlap.

4. Implementation of the terms of the proposed Safe Harbor Agreement is consistent with applicable Federal, State, and Tribal laws and regulations.

The proposed Agreement is consistent with all applicable Federal and State laws and regulations. In accordance with National Environmental Policy Act (NEPA), the Service

prepared an Environmental Action Statement, hereby incorporated by reference, in which we determined that the proposed Agreement and enhancement of survival permit qualified as a categorical exclusion based on 516 DM 2, Appendix 1 and 516 DM 6, Appendix 1.4(C)(1) (issuance of a permit for activities regulated under 50 CFR Chapter 1, Subsection B when such permits cause no or negligible environmental disturbance).

There are no Tribal laws or regulations applicable to the Agreement.

5. Implementation of the terms of the Safe Harbor Agreement will not be in conflict with any ongoing conservation or recovery programs for listed species covered by the permit.

Approval of the proposed Agreement will directly contribute to implementation of recovery tasks as outlined in the recovery plans developed respectively for each species (USFWS 1990, 1998). Approval of the Agreement is expected to enhance survival and recovery of LCT by increasing the amount of occupied habitat, implementing networked populations, and protecting existing populations. The purpose of the Agreement is to enhance the reintroduction and long-term conservation of LCT within the Therefore, the Agreement will not be in conflict with ongoing conservation or recovery programs and will contribute to ongoing conservation and recovery programs.

6. The Applicant has shown capability for and commitment to implementing all of the terms of the Safe Harbor Agreement.

NDOW has shown that they are committed to implementing all of the terms of the proposed Agreement. NDOW has worked cooperatively with the Service throughout the entire Safe Harbor development process.

NDOW has shared management authority over razorback sucker and bonytail chub, which are classified as endangered by State statute (NAC 503.065). They are intensively involved with management of the species, and are involved with all recovery-oriented groups relevant to these fish, including the Lower Colorado River Recovery Team and the Lower Colorado River Multiple Species Habitat Conservation Plan workgroup. NDOW also has an active program rearing razorback suckers in State hatcheries, and has several field biologists working on management of these species in the Colorado River system.

Signing of the Agreement by NDOW and the Service assures that it will be implemented. The Agreement is a legally-binding agreement assuring the performance of the signatory parties. Performance of the Agreement is included as a condition of the Permit. Failure to perform these obligations may be grounds for suspension or revocation of the Permit. Both the Service and NDOW will work closely with each other to ensure the success of this Agreement. It is inherent within the missions of these agencies to work with partners to protect, enhance, and maintain healthy habitats for endangered and threatened species such as the razorback sucker and bonytail chub.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS- ANALYSIS AND FINDINGS

The Service has no evidence that the permit application should be denied on the basis of criteria and conditions set forth in 50 CFR 13.21(b)-(c). NDOW has met the criteria for the issuance of the Permit and approval of the proposed Agreement and does not have any disqualifying factors that would prevent the Permit or proposed Agreement from being approved under current regulations.

V. RECOMMENDATIONS ON ISSUANCE OF PERMIT

Based on our findings with respect to the permit application, Environmental Action Statement, and proposed Safe Harbor Agreement, the Service recommends issuance of Endangered Species Act section 10(a)(1)(A) enhancement of survival permit, TE-114687-0 to authorize incidental taking of razorback suckers and bonytail chub by NDOW and Cooperators in accordance with the Programmatic Safe Harbor Agreement.

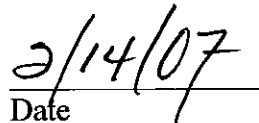
VI. REFERENCES CITED

US Fish and Wildlife Service. 1990. Bonytail Chub Revised Recovery Plan. Denver; US Fish and Wildlife Service, Region 6. 35 pg.

US Fish and Wildlife Service. 1998. Razorback sucker (*Xyrauchen texanus*) Recovery Plan. Denver; US Fish and Wildlife Service, Region 6. 81 pg.

US Fish and Wildlife Service. 2007. Biological Opinion on the Effects of the Issuance of an Enhancement of Survival Permit Under Section 10(a)(1)(A) of the Endangered Species Act to the Nevada Department of Wildlife. 16 pg.


Nevada Field Supervisor


Date